

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott
Edward A. Garvey
Marshall Johnson
LeRoy Koppendrayer
Phyllis A. Reha

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of the Application of the City of
Lake Crystal to Extend its Assigned Service
Area into the Area Presently Served by Blue
Earth-Nicollet -Faribault Cooperative Electric
Association

ISSUE DATE: November 16, 2001

DOCKET NO. E-104,262/SA-01-755

ORDER DISMISSING CLAIMS,
DESIGNATING INTERIM PROVIDER, AND
NOTICE AND ORDER FOR HEARING

PROCEDURAL HISTORY

On May 11, 2001, the City of Lake Crystal (Lake Crystal or the City) submitted a petition regarding its service area boundary with Blue Earth-Nicollet-Faribault Cooperative Electric Association (BENCO or the Cooperative). The City requested in its petition that the Commission:

- incorporate the Lilly Lakes Estates area into the assigned electric service area of the City;
- determine the boundary of the City's assigned service area in the Crystal Creek Development and incorporate any of that development outside the City's current assigned service area into the assigned service area of the City;
- grant the City authority to provide interim service throughout Lilly Lakes Estates and the Crystal Creek Development; and
- determine the appropriate compensation to be paid by the City to BENCO for acquisition of BENCO's service territory.

On June 4, BENCO filed its response to Lake Crystal's petition. BENCO's response requested that the Commission dismiss the City's request to acquire additional BENCO service territory. BENCO cited a 1993 agreement between the City and BENCO in which the City agreed not to acquire additional service territory from BENCO through September 2013.

Further, on the same date, BENCO filed a service territory complaint requesting the Commission require the City to remove its facilities from BENCO's service territory in the Crystal Creek subdivision.

On June 19, 2001, Lake Crystal filed its reply comments, which requested that the Commission disregard as void the freeze provision of the 1993 agreement, or refer the issue to an Administrative Law Judge (ALJ) for factual determinations. It also requested a hearing before an ALJ to determine the boundaries of the service territory areas involved in the Crystal Creek Development.

On June 19, 2001, the Department of Commerce (DOC) filed its comments. The DOC recommended that the Commission deny the City's petition without prejudice, note that the City may take the 1993 agreement between BENCO and the City to district court to determine its enforceability, and not act at this time on BENCO's request that the Commission order the City to remove its facilities from the Crystal Creek Development.

On July 10, 2001, BENCO filed a copy of its request to the City for clarification and further documentation relating to Exhibit C of the City's reply comments of June 19, 2001. Exhibit C addressed the service area boundary issue in the Crystal Creek subdivision.

On July 30, 2001, Lake Crystal and BENCO submitted a letter requesting that the Commission delay consideration of this matter (at that time scheduled for July 31) for approximately 45 days to enable the parties to pursue settlement negotiations. The parties indicated that if settlement was not achieved, they would ask that the matter be rescheduled. The Commission removed this item from the July 31, 2001 agenda.

In a letter of September 25, 2001, BENCO indicated that the parties were unable to reach a settlement and requested that the matter be rescheduled.

On October 29, 2001, the City submitted an affidavit, dated October 24, 2001, of Al Sutherland in response to BENCO's July 10, 2001 request for additional information concerning the service area boundary in the Crystal Creek subdivision and in response to BENCO's reply comments of June 4, 2001.

On October 29, 2001, BENCO submitted a letter responding to Exhibit C of the City's June 19, 2001 reply petition and to the affidavit of October 24, 2001.

On October 30, 2001, the matter came before the Commission.

FINDINGS AND CONCLUSIONS

I. Background

The City of Lake Crystal owns and operates an electrical distribution system with an assigned service area¹. BENCO is a Minnesota cooperative engaged in the business of distributing electrical power also within an assigned service area.

¹ As defined in Minn.Stat. § 216B.38.

In 1993 the City annexed certain property which was part of BENCO's assigned service area. The City and BENCO entered into an agreement on October 5, 1993 by which BENCO would transfer the service territory represented by the annexed property to the City (the Agreement). The terms and conditions of this Agreement included, inter alia, the following moratorium provision:

2. The City will not use its powers of eminent domain, condemnation or statutory power to expand its service territory to acquire additional service territory from the Coop through and including the month of September, 2013. The parties to this agreement, their successors or assigns, may nevertheless agree to mutually adjust or transfer service territory.

Early in 1999, the City annexed certain other property that came to be known as Lilly Lake Estates. Later in 1999 the City also annexed additional property which was subsequently developed as the Crystal Creek subdivision. These annexations have raised various issues regarding the provisioning of electric service.

This Order will separately address the issues regarding the Lilly Lake Estates and the Crystal Creek subdivision.

II. Applicable Statutory Provisions

A. Assigned Service Areas

In 1974 the Minnesota Legislature determined that the orderly development of economical statewide electric service required granting electric utilities exclusive service rights within designated service areas:

It is hereby declared to be in the public interest that, in order to encourage the development of coordinated statewide electric service at retail, to eliminate or avoid unnecessary duplication of electric utility facilities, and to promote economical, efficient, and adequate electric services to the public, the state of Minnesota shall be divided into geographic service areas within which a specified electric utility shall provide electric service to customers on an exclusive basis.²

B. Municipal Service Territory Extension

The Legislature recognized that service areas would require adjustment over time; it therefore authorized municipal utilities to expand their service areas as their corporate boundaries expanded:

- (a) ... whenever a municipality which owns and operates an electric utility (1) extends its corporate boundaries through annexation or consolidation, or (2) determines to extend its

² Minn. Stat. § 216B.37.

service territory within its existing corporate boundaries, the municipality shall thereafter furnish electric service to these areas unless the area is already receiving electric service from an electric utility, in which event, the municipality may purchase the facilities of the electric utility serving the area.³

III. Lake Crystal's Petition and BENCO's Complaint

A. The City's Petition

The City's petition asked the Commission to;

- incorporate the Lilly Lakes Estates area into the assigned electric service area of the City;
- determine the boundary of the City's assigned service area in the Crystal Creek Development and incorporate any of that Development outside the City's current assigned service area into the assigned service area of the City;
- grant the City authority to provide interim service throughout Lilly Lakes Estates and Crystal Creek; and
- determine the appropriate compensation to be paid by the City to BENCO for acquisition of BENCO's service territory.

B. BENCO's Complaint

The basis for BENCO's service territory complaint was that the City had extended its distribution facilities throughout the Crystal Creek subdivision, including 16 lots that BENCO understood to be in BENCO's assigned service territory. BENCO asked that the Commission order the City to remove its facilities from BENCO's service territory in the Crystal Creek subdivision.

IV. The Parties' Positions Regarding Lilly Lakes Estates

A. The City of Lake Crystal

The City wishes to extend its assigned electric service area to include Lilly Lake Estates. It argued that pursuant to Minn. Stat. § 216B.44, the City, in this situation, may purchase the facilities of the electric utility serving the area, and if the parties cannot agree on appropriate terms for the sale, the City may ask the Commission to determine the appropriate value of the property within the annexed area. The City argued that it attempted to negotiate the terms of a purchase with BENCO but that the parties were unable to reach agreement; therefore, it was now asking the Commission to make the determination of appropriate value.

³ Minn. Stat. § 216B.44.

The City further argued that the moratorium provision in the 1993 Agreement should not be enforced by the Commission. The reasons the City gave for this included:

- the provision is void under the City's charter;
- the Agreement was signed without city council review or approval;
- the Agreement was not submitted to the Commission or the DOC for approval;
- there was no separate consideration for the moratorium provision;
- the City's 1993 estimate of the size and location of city growth and annexation was in error;
- the provision is against public policy in that it deprives the City from exercising its statutory and governmental powers to provide electricity to its residents;
- the provision impermissibly restricts future City authorities.

B. BENCO

After the City annexed the property that was developed as Lilly Lakes Estates, the City indicated that it wanted to provide electric service to the development. The City and BENCO met several times to attempt to agree to service territory adjustments. When no agreement was reached, BENCO installed the necessary distribution facilities to serve the development.

It is BENCO's position that the City should comply with the terms of the 1993 Agreement, including the moratorium provision. It argued that under principles of contract law, the provision is binding, valid and enforceable.

BENCO argued that public policy favors the resolution of municipal utility/electric cooperative service territory disputes at the local level. Consistent with that position, the Commission should not at this time disturb the 1993 Agreement between the parties.

Further, BENCO argued that the operation of a municipal utility is a proprietary function of the City, not a governmental function. Public policy considerations may prevent a municipality from entering into agreements that restrict its governmental or police power functions but those same public policy considerations do not apply to a city's business, such as operating a utility.

C. The DOC

The DOC argued that, generally, Minn. Stat. § 216B.44 would provide the Commission with authority to approve a municipal utility's petition to acquire the service territory of a cooperative as a result of an annexation, and to set the price to be paid where the two parties could not agree. However in the present situation the City's petition is different due to the moratorium set forth in the 1993 Agreement between the parties.

The DOC saw the enforcement of the moratorium as the overriding issue in this case. If the Agreement was legally binding, then the City's petition should be denied. If, on the other hand, the Agreement was void or unenforceable the City would have a statutory right to expand its service territory pursuant to Minn. Stat § 216B.44, as it has attempted to do.

The DOC noted that while the Commission may possess authority to resolve the contractual dispute, the Commission generally does not inquire into the foundational legality of city council votes or of the resulting contracts. To do so would require investigation of issues not generally addressed by the Commission.

The DOC did not recommend that the Commission determine the enforceability of the moratorium provision but, rather, recommended that the Commission deny the petition. It argued that the City was free to seek a district court ruling on the legality of the contractual moratorium and could return to the Commission if circumstances warranted.

V. Commission Action Regarding Lilly Lakes Estates

The Commission recognizes the Agreement that was entered into by the parties in 1993. The Commission does not find that the Agreement is contrary to utility public law or policy. The City, in asking the Commission to find the moratorium provision of the 1993 Agreement unenforceable, has raised arguments that involve, among other things, interpreting a city's charter powers. The Commission, recognizing that it does not have expertise in the area of municipal law, will decline to do so under the facts and circumstances presented in this case.

Further, the Commission declines to refer the interpretation of the 1993 Agreement to the Office of Administrative Hearings for a contested case proceeding as there are no contested material facts but rather questions of law and policy.

In addition, the Commission has a general policy of supporting the local resolution of service territory disputes and it was such local resolution of a service area dispute which produced the 1993 Agreement. For these reasons the Commission will dismiss the City's petition as it relates to the Lilly Lakes Estates.

VI. The Parties' Positions Regarding the Crystal Creek Development

A. Background

In 1974, when the Minnesota Legislature made the decision to grant electric utilities exclusive service rights within designated service areas, the Commission was required to establish assigned service areas for all electric utilities, and to prepare official service area maps showing the boundaries of the service areas established. It is the interpretation of the assigned service area boundary on the map filed with the Commission at that time that is in dispute.

B. The City of Lake Crystal

The City claimed that the service area boundary within this development was ambiguous and requested that the Commission determine exactly where this boundary lies. The City argued that there were three potential service boundaries each established from known survey reference points.

The City requested that this matter be referred to the Office of Administrative Hearings (OAH) and that the City have an opportunity to present parol evidence to support its position.

Further, the City argued that to the extent any of this area was found to lie within BENCO's service territory, the City requested that the Commission determine appropriate compensation and transfer the service area to the City.

C. BENCO

BENCO argued that 16 lots in the Crystal Creek subdivision are in BENCO's service area and that the City has inappropriately extended its distribution utility facilities throughout the Crystal Creek subdivision, including the 16 lots in BENCO's service territory.

BENCO argued that the City had not provided support for its position that BENCO has no assigned service territory in this subdivision. Further, BENCO argued that one of the three possible boundary lines submitted by the City coincided with the service boundary understood by BENCO.

As to the City's request that even if BENCO has any assigned territory in the Crystal Creek subdivision it should be transferred to the City, BENCO argued that the 1993 Agreement between the parties would be enforceable in this situation for the same reasons that BENCO presented in paragraph IV, above.

D. The DOC

The DOC was not presented with the filings of October 29, 2001 on the service area boundary issue prior to the meeting and therefore was unable to comment on it.

VII. The Commission's Action on the Issues Regarding the Crystal Creek Subdivision

The Commission finds that it cannot satisfactorily resolve the question of the service area boundary on the basis of the filings by the parties. This service area boundary dispute involves contested material facts that can best be resolved by referral to the OAH for a complete and full development of the record. The Commission will do so.

The contested case proceeding will be limited to the issue of the appropriate service area boundary between the parties in the Crystal Creek subdivision. (Information on the assigned Administrative Law Judge and other matters regarding the hearing procedure is set forth in Paragraph VIII, below.)

For the same reasons that the City's petition regarding the Lilly Lake Estates will be dismissed by the Commission (see part V, above), the Commission will dismiss the City's request that if any of the Crystal Creek subdivision should be found to be in BENCO's service area the Commission determine adequate compensation for that service area and transfer the area to the City.

VIII. Interim Service in the Crystal Creek Subdivision

Each party stated its interest in and its ability to provide interim service in the disputed area⁴ of the Crystal Creek subdivision until the service area boundary dispute was resolved by the Commission.

The City argued that there were three possible service area boundaries; BENCO argued that there was one. BENCO's boundary line, however, corresponded with one of the City's and the City acknowledged that BENCO might have a small assigned service area in the Crystal Creek subdivision.

Given this, and recognizing that there was a need for development to proceed and interim service to be assigned, the Commission will assign BENCO to provide interim service in the disputed area in the Crystal Creek subdivision. The Commission will so order.

IX. Procedural Outline

A. Administrative Law Judge

The Administrative Law Judge assigned to this case is Allan W. Klein. His address and telephone number are as follows: Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota 55401-2138; (612) 341-7609.

B. Hearing Procedure

- *Controlling Statutes and Rules*

Hearings in this matter will be conducted in accordance with the Administrative Procedure Act, Minn. Stat. §§ 14.57-14.62; the rules of the Office of Administrative Hearings, Minn. Rules, parts 1400.5100 to 1400.8400; and, to the extent that they are not superseded by those rules, the Commission's Rules of Practice and Procedure, Minn. Rules, parts 7829.0100 to 7829.3200.

Copies of these rules and statutes may be purchased from the Print Communications Division of the Department of Administration, 117 University Avenue, St. Paul, Minnesota 55155; (651) 297-3000. These rules and statutes also appear on the State of Minnesota's website at www.revisor.leg.state.mn.us.

The Office of Administrative Hearings conducts contested case proceedings in accordance with the Minnesota Rules of Professional Conduct and the Professionalism Aspirations adopted by the Minnesota State Bar Association.

- *Right to Counsel and to Present Evidence*

⁴ The disputed area in the Crystal Creek subdivision refers to the 16 lots BENCO understands to be within its assigned service area.

In these proceedings, parties may be represented by counsel, may appear on their own behalf, or may be represented by another person of their choice, unless otherwise prohibited as the unauthorized practice of law. They have the right to present evidence, conduct cross-examination, and make written and oral argument. Under Minn. Rules, part 1400.7000, they may obtain subpoenas to compel the attendance of witnesses and the production of documents.

Parties should bring to the hearing all documents, records, and witnesses necessary to support their positions.

- *Discovery and Informal Disposition*

Any questions regarding discovery under Minn. Rules, parts 1400.6700 to 1400.6800 or informal disposition under Minn. Rules, part 1400.5900 should be directed to Stuart Mitchell, Public Utilities Rates Analyst, Minnesota Public Utilities Commission, 121 7th Place East, Suite 350, St. Paul, Minnesota 55101-2147, (651)296-8662; or James Alexander, Assistant Attorney General, 1100 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, (651) 282-9965.

- *Protecting Not-Public Data*

State agencies are required by law to keep some data not public. Parties must advise the Administrative Law Judge if not-public data is offered into the record. They should take note that any not-public data admitted into evidence may become public unless a party objects and requests relief under Minn. Stat. § 14.60, subd. 2.

- *Accommodations for Disabilities; Interpreter Services*

At the request of any individual, this agency will make accommodations to ensure that the hearing in this case is accessible. The agency will appoint a qualified interpreter if necessary. Persons must promptly notify the Administrative Law Judge if an interpreter is needed.

- *Scheduling Issues*

The times, dates, and places of public and evidentiary hearings in this matter will be set by order of the Administrative Law Judge after consultation with the Commission and intervening parties.

- *Notice of Appearance*

Any party intending to appear at the hearing must file a notice of appearance (Attachment A) with the Administrative Law Judge within 20 days of the date of this Notice and Order for Hearing.

- *Sanctions for Non-compliance*

Failure to appear at a prehearing conference, a settlement conference, or the hearing, or failure to comply with any order of the Administrative Law Judge, may result in facts or issues being resolved against the party who fails to appear or comply.

C. Parties and Intervention

The current parties to this case are the City of Lake Crystal and BENCO and the Minnesota Department of Commerce. Other persons wishing to become formal parties shall promptly file petitions to intervene with the Administrative Law Judge. They shall serve copies of such petitions on all current parties and on the Commission. Minn. Rules, part 1400.6200.

D. Prehearing Conference

A prehearing conference will be held in this case on Wednesday, December 19, 2001 at 9:30 a.m. in the Small Hearing Room, Public Utilities Commission, 121 7th Place East, Suite 350, St. Paul, Minnesota 55101. Persons participating in the prehearing conference should be prepared to discuss time frames, scheduling, discovery procedures, and similar issues. Potential parties are invited to attend the pre-hearing conference and to file their petitions to intervene as soon as possible.

X. Application of Ethics in Government Act

The lobbying provisions of the Ethics in Government Act, Minn. Stat. §§ 10A.01 et seq., may apply in this case. Persons appearing in this proceeding may be subject to registration, reporting, and other requirements set forth in that Act. All persons appearing in this case are urged to refer to the Act and to contact the Campaign Finance and Public Disclosure Board, telephone number (651) 296-5148, with any questions.

XI. Ex Parte Communications

Restrictions on ex parte communications with Commissioners and reporting requirements regarding such communications with Commission staff apply to this proceeding from the date of this Order. Those restrictions and reporting requirements are set forth at Minn. Rules, parts 7845.7300-7845.7400, which all parties are urged to consult.

ORDER

1. The dispute regarding service area boundaries in the Crystal Creek development is hereby referred to the Office of Administrative Hearings for a contested case proceeding, as set forth above.

2. The contested case proceeding shall begin with a prehearing conference on Wednesday, December 19, 2001 at 9:30 a.m. in the Small Hearing Room, Public Utilities Commission, 121 7th Place East, Suite 350, St. Paul, Minnesota 55101.
3. Until final resolution by the Commission of the service area boundary dispute in the Crystal Creek development, BENCO shall provide interim service in the disputed area within this subdivision.
4. The petition of the City of Lake Crystal is dismissed as to all issues except for the matters set forth in paragraphs 1 and 3, above.
5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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ATTACHMENT A

BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS

100 Washington Square, Suite 1700
Minneapolis, Minnesota 55401-2138

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

121 Seventh Place East Suite 350
St. Paul, Minnesota 55101-2147

In the Matter of the Application of the City of
Lake Crystal to Extend its Assigned Service
Area into the Area Presently Served by
Blue Earth-Nicollet-Faribault Cooperative
Electric Association

MPUC Docket No. E-104,262/SA-01-755

OAH Docket No.

NOTICE OF APPEARANCE

Name, Address and Telephone Number of Administrative Law Judge:

Allan W. Klein, Office of Administrative Hearings, Suite, 1700, 100 Washington Square,
Minneapolis, Minnesota 55401; (612) 341-7609.

TO THE ADMINISTRATIVE LAW JUDGE:

You are advised that the party named below will appear at the above hearing.

NAME OF PARTY:

ADDRESS:

TELEPHONE NUMBER:

PARTY'S ATTORNEY OR OTHER REPRESENTATIVE:

OFFICE ADDRESS:

TELEPHONE NUMBER:

SIGNATURE OF PARTY OR ATTORNEY: _____

DATE: _____